No. 12360.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GLENN O. PRICKETT, H. F. WINANS and S. E. WHITNEY, on behalf of themselves and other employees similarly situated,

Appellants,

vs.

CONSOLIDATED LIQUIDATING CORPORATION,

Appellee.

APPELLANTS' REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

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1. The Order Appealed From Is a Final Judgment of Dismissal as to Each of the Employees Referred to Therein and, Therefore, Is Appealable as a "Final Decision."

As pointed out in Appellants' Opening Brief, the claim of each of the employees is separate and distinct from that of the other employees who are joined in the action.

Thus, when the claim of any single employee is dismissed, and a Judgment of Dismissal entered as to him, that judgment is a final decision from which the employee

affected is entitled to appeal. This precise point was considered and so determined by the United States Court of Appeals for the Second Circuit, in *Gibbons v. Equitable Life Assurance Soc.* (1949), 173 F. 2d 337.

Any contrary holding would place the appellants in the precise position in which the court in *Markert v. Swift & Co., Inc.* (C. A. 2d, 1949), 173 F. 2d 517, held they may not be placed[1]:

> "It is clear that these orders, particularly the latter one, both close and seal the door of the federal court to any claim for relief of these plaintiffs under the Fair Labor Standards Act for the grievances asserted. Unless they can now obtain review, they never will have appellate examination of their contention that they are entitled to overtime compensation within the very provisions of the Portal-to-Portal Act itself. Thus it is hard to conceive of a more final (and hence reviewable) judicial action as affecting their asserted rights."

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[1]The holding itself did not involve the precise point now before the Court, but the situation described by the quoted language is pertinent.

2. **Appellants Have Complied With All of the Requirements of the Portal-to-Portal Act, Applicable to Them.**

It is appellants' contention that each of them was expressly named as a party plaintiff by the filing of the original Complaint, as supplemented by the Bill of Particulars filed on June 5, 1947. Appellee suggests that the question as to the function of the Bill of Particulars is academic in view of the Amendments to Rule 12(e) which deleted references to the Bill of Particulars. It must, however, be borne in mind that these Amendments did not become effective until March 19, 1948.

Federal Rules of Civil Procedure, as amended, Rule 86(b).

See:

U. S. Dept. of Justice Circular No. 4013, Supp. 1, January 28, 1948.

Therefore, at the time appellee moved for an order for a Bill of Particulars, at the time the order was granted, and at the time the Bill of Particulars was filed, Rule 12 (e) provided for a Bill of Particulars and its function in the case is that described by appellants in their Opening Brief, that is, it amends and becomes a part of the original Complaint.

Appellee urges that the provisions of Section 8 required the appellants to file written consents. Its argument, together with its attempt to distinguish cases holding the

contrary, is based upon the assumption that May 14, 1947, is "the critical date." By the express language of Section 8, however, May 14, 1947, is simply the commencement of the 120-day period in which the appellants might be *named*. Filing of written consents is then required only of such plaintiffs as are *not* named within the 120-day period.

> *Gibbons v. Equitable Life Assurance Soc.* (C. A. 2d, 1949), 173 F. 2d 337.

Each of the appellants was specifically named as a party plaintiff on June 5, 1947. Accordingly, none of them was required to file written consents.

In support of its contention, appellee relies upon *Lockwood v. Hercules Powder Co.* (W. D. Mo. 1948), 78 F. Supp. 716. This case was decided February 16, 1948. Subsequently, the United States Court of Appeals for the Eighth Circuit, reached the opposite conclusion in *Central Missouri Telephone Co. v. Conwell* (Nov. 16, 1948), 170 F. 2d 641. This decision being controlling upon the District Court for the Western District of Missouri, the decision in *Lockwood v. Hercules Powder Co.* can no longer be said to represent the law even in that District.

3. **The Amended Complaint Sufficiently Stated the Jurisdictional Allegations Required by the Portal-to-Portal Act of 1947.**

The Court below considered and ruled adversely to appellee's contention that the Amended Complaint did not allege facts establishing the jurisdiction of the Court, the motion to dismiss on this ground having been denied as to the three originally named plaintiffs [Tr. pp. 38-39].

In the following cases, relied upon by appellee, there were no allegations whatsoever, as there are here, that the activities for which compensation was sought were compensable by reason of an express provision of a contract or by custom or practice in the establishment.

Tipton v. Bearl Sprott Co. (C. A. 9, 1949), 175 F. 2d 432;

Bonner v. Elizabeth Arden, Inc. (C. A. 2, 1949), 177 F. 2d 703;

Story v. Todd Houston S. Corp. (S. D. Tex., 1947), 72 F. Supp. 690.

The same is true of the following cases cited in the portions of opinions quoted by appellee:

Sinclair v. United States Gypsum Co. (W. D. N. Y.), 81 F. Supp. 365;

Hays v. Hercules Powder Co. (D. C. Mo.), 7 F. R. D. 747;

Borucki v. Continental Baking Co. (D. C. N. Y.), 74 F. Supp. 815;

Moeller v. Eastern Gas & Fuel Associates (D. C. Mass.), 74 F. Supp. 937;

Johnson v. Park City Consolidated Mines Company (D. C.), 73 F. Supp. 852.

There remains then the following authorities which at first blush appear to support appellee's argument:

Newson v. E. I. DuPont de Nemours & Co. (C. A 6, 1949), 173 F. 2d 856;

Coyle v. Philadelphia Macaroni Co. (E. D. Pa., 1949), 9 F. R. D. 331;

Sadler v. W. S. Dickey Clay Manufacturing Company (W. D. Mo.), 78 F. Supp. 616;

Smith v. Cudahy Packing Co. (D. C. Minn.), 76 F. Supp. 575;

Hutchings v. Lando (S. D., N. Y., 1949), 83 F. Supp. 615.

Central Mo. Tel. Co. v. Conwell (C. A. 8, 1948), 170 F. 2d 641, supersedes anything to the contrary in the cases of *Sadler v. W. S. Dickey Clay Manufacturing Company* and *Smith v. Cudahy Packing Company.*

An examination of the three cases remaining, as well as the two superseded, reveals that the complaints held to be defective expressly described the activities upon which the claims were based as "portal" type activities, that is, activities of the type involved in the *Mt. Clemens Pottery Co.* case. Where such express allegations raise doubt as to jurisdiction, there may be said to be some justification for requiring additional allegations to show that the contract, custom or usage referred to contemplated compensation for the portal type activities described in the Complaint.

It is respectfully submitted that the better view is represented by the decisions of the Courts of Appeal in the following cases:

Central Missouri Telephone Co. v. Conwell (C. A. 8, 1948), 170 F. 2d 641;

Frank v. Wilson & Co. (C. A. 7, 1949), 172 F. 2d 712;

Manosky v. Bethlehem Hingham S. Corp. (C. A. 1, 1949).

Although the sufficiency of the pleadings was not there involved, the decision of this Court in *Mills v. Joshua Hendy Corp.* (C. A. 9, 1948), 169 F. 2d 898, supports the views here reached. The Court there held that the precise activities for which compensation is here sought were compensable under the express provisions of a contract identical to that here involved. In this connection, it is to be borne in mind that in the case at bar the sufficiency of the jurisdictional allegations was upheld by the trial court at a time following pre-trial procedure when the collective bargaining contract was identified by stipulation as Plaintiff's Exhibit 1 [Tr. p. 28]. Under these circumstances, and in the light of the decision in *Mills v. Joshua Hendy Corp.*, the soundness of the trial court's order in holding the Complaint to be sufficient, appears unassailable.

Conclusion.

It is respectfully submitted, therefore, that the order appealed from is a Final Judgment as to each of these appellants, that Section 8 did not require any of the appellants to file written consents to become parties plaintiff, and that jurisdiction was properly and sufficiently alleged. Accordingly, the order dismissing the Complaint as to these employees should be reversed.

Respectfully submitted,

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